

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





JOINT APPENDIX

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,117

ROMAN E. SCARLETT,

v.

LUKE C. MOORE, UNITED STATES MARSHAL  
IN AND FOR THE DISTRICT OF COLUMBIA,

*Appellant.*

*Appellee.*

*Appeal From the United States District Court  
for the District of Columbia*

United States Court of Appeals  
for the District of Columbia Circuit

FILED MAR 26 1965

*Nathan J. Paulson*  
CLERK

TABLE OF CONTENTS

Requisition dated November 17, 1964 .....	1
Affidavit of John B. Maybee, dated November 17, 1964 .....	2
Complaint and Warrant, dated August 1, 1964 .....	5
Proceedings of November 18, 1964, USDC DC, McGuire, J.....	7
Order to Surrender dated November 18, 1964, McGuire, J. ....	15
Petition, filed November 18, 1964 .....	16
Return and Answer to Rule to Show Cause, filed November 19, 1964 ...	17
Habeas Corpus, filed November 18, 1964 .....	19
Proceedings of November 19, 1964, Tamm, J. ....	20
Oral Ruling of the Court .....	33
Petitioner's Exhibit A, filed November 19, 1964 .....	34
Findings of Fact and Conclusions of Law, filed November 23, 1964, Tamm, J. ....	36
Order, Tamm, J., filed November 23, 1964 .....	36
Notice of Appeal, filed December 2, 1964 .....	37

## JOINT APPENDIX

### REQUISITION

#### THE STATE OF DELAWARE EXECUTIVE DEPARTMENT

Elbert N. Carvel, Governor of the State of Delaware

To the Chief Judge of the United States District Court for the District of Columbia

WHEREAS It appears by Supporting Documents and Papers which are hereunto annexed, and which I certify to be authentic and duly authenticated in accordance with the Laws of this State, that Roman E. Scarlett stands charged with the crime of Conspiring To Defraud and Cheat the State of Delaware by Obtaining Money Under False Pretenses which I certify to be a crime under the Laws of this State, committed in the County of Kent in this State; and it having been represented to me that he has fled from the justice of this State, and may have taken refuge within the State of District of Columbia

NOW THEREFORE, Pursuant to the provisions of the Constitution and Laws of the United States, in such case made and provided, I do hereby require that the said Roman E. Scarlett be apprehended and delivered to W. Deane Johnston, State Detective and/or Lt. Colonel, Delaware State Police who are hereby authorized to receive and convey him to the State of Delaware, there to be dealt with according to law.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Great Seal of the State of Delaware to be affixed at Dover, this Seventeenth day of November in the year of our Lord one thousand nine hundred sixty-four and of the Independence of the United States the one hundred and eighty-ninth.

By the Governor:

s/ Elbert N. Carvel

s/ Elisha C. Dukes  
Secretary of State.

AFFIDAVIT OF JOHN B. MAYBEE

STATE OF DELAWARE)

) SS

KENT COUNTY )

Be it remembered that on this 17th day of November, A.D. 1964, personally appeared before me, a Notary Public for the State of Delaware, the subscriber, John B. Maybee, who being by me duly sworn in the manner according to law, did depose and say:

(1) That he is a Deputy Attorney General of the State of Delaware.

(2) That on or about the 28th day of August A. D. 1963 in Milford Hundred, County of Kent, State of Delaware, and at various and diverse other times during the Spring and Summer months of 1963, in Kent County Delaware as well as in the Sussex County, State of Delaware, and the State of Maryland, while being employed as a truck driver for Alfred H. Smith, Roman E. Scarlett did then and there unlawfully conspire, confederate, and agree with one or more of the following persons (as well as with various other persons not now known), to wit: Edgar D. Standridge, Henry C. Standridge, Henry Burris, Frank Burris, James C. Fulford, Burlan F. Walters, Charles E. Kidwell, William T. Kidwell, George W. Strawn, (said persons being employed by Alfred H. Smith, during the time herein pertinent) and Alfred H. Smith to cheat and defraud the State of Delaware by obtaining money by false pretenses from the Delaware State Highway Department, in that he and one or more of the aforesaid conspirators, knowing that the said Alfred H. Smith was under contract with the said Department pursuant to contracts numbered 2100, 2133, 2135, and 2137, wherein it was provided that the said Smith should supply to the said Department various shipments of liquid asphalt to be paid for by the said Department on the basis of certain certified weight slips to be supplied to the said Department by the said Smith or his agents, did conspire, confederate, and agree with one or more of the aforesaid conspirators to deliver or cause to be delivered (and in cer-



tain instances did deliver) to the said Department various shipments of liquid asphalt which would be of less quantity by weight than would be reflected on the said certified weight slips which would be provided (and in certain instances were provided) to the said Department along with the various short weighted shipments, with the intent that the said Department should pay the said Smith for the quantity of weight shown on the respective certified weight slips, which quantity would be greater than the quantity actually delivered to the said Department, all to the detriment of the said Department, and the State of Delaware, against the Law, and Peace and Dignity of the State, in violation of 11 Delaware Code § 105.

(3) That on 28 August A.D. 1963 Roman E. Scarlett was apprehended by the Delaware State Police with a short load of liquid asphalt destined for a Delaware State Highway project, as a result of which he was arrested by the Delaware State Police in Kent County, Delaware, on a charge of Attempted Fraud. He was then taken before a Magistrate and placed under bond for his later appearance in the Kent County Court of Common Pleas to answer to said charge. At a later date he did so appear before said Court, was arraigned and entered a plea of not guilty. Subsequent to that his Delaware counsel filed a motion to dismiss the information and in support of said motion a brief was filed. Thereafter, upon consideration by the undersigned, our investigation into the overall case having just begun, it was decided to enter a nolle prosequi to the aforesaid charge of attempted fraud. This was then done and Scarlett was released from his bond. In the meanwhile the investigation continued. This investigation covered many months. Finally on 1 August 1964 the undersigned procured from a Magistrate in and for Kent County, Delaware various warrants for the arrest of Scarlett and his ten co-conspirators. These warrants were procured at the earliest practicable date considering the nature of the case and the difficulties encountered in the investigation.

(4) That Scarlett has not returned to the State of Delaware subsequent to his aforesaid arraignment before the Court of Common Pleas on the Attempted Fraud charge, and on leaving this State after said arraignment has remained away from this State with knowledge that he was wanted in this State for the aforesaid crime of Conspiracy to Cheat and Defraud, and thus he has fled the jurisdiction of this State to avoid prosecution herein and has remained a fugitive from the State of Delaware, having fled to the City of Washington, District of Columbia.

(5) That the Deponent is informed that the said Scarlett has been apprehended by the Metropolitan Police Department of the City of Washington, District of Columbia, upon a fugitive warrant based on the charges pending against him in this State, and is currently under bond for his appearance before the United States District Court for the District of Columbia on an extradition hearing arising out of the charges pending against him in this State.

(6) That the deponent is informed that the said Scarlett has refused to return to this State without the issuance of Requisition Papers and has demanded an extradition hearing before the aforesaid District Court.

(7) That the deponent believes and is of the opinion that the ends of justice require the arrest and return of the accused Scarlett to the State of Delaware for trial, and further states that this proceeding is not instituted to enforce a private claim.

s/ John B. Maybee  
Deputy Attorney General

Sworn to and subscribed before me this 17th day of November, A. D. 1964.

s/ Nevill C. Tinder  
Notary Public

COMPLAINT AND WARRANT

STATE OF DELAWARE      To Any Constable of said County, Greeting  
Kent County, ss.      BE IT REMEMBERED,

That John Behen Maybee, Deputy Attorney General of Dover, Kent County, Delaware on behalf of the State of Delaware, personally appeared before me, Maurice W. Carrow, a Justice of the Peace of the State of Delaware, in and for Kent County, and hath made oath in due form of law, on information and belief, that on or about the 28th day of August A. D. 1963 in Milford Hundred, State and County aforesaid, and at various and diverse other times during the spring and summer months of 1963, in Kent County, Delaware as well as in Sussex County, Delaware and the State of Maryland, Roman E. Scarlett late of Washington, D. C. did then and there unlawfully conspire, confederate and agree with one or more of the following persons (as well as with various other persons not now known), to wit: Edgar D. Standridge, Henry C. Standridge, Henry Burris, Frank Burris, James C. Fulford, Burlan F. Walters, Charles E. Kidwell, William T. Kidwell, George W. Strawn, (said persons being employed by Alfred H. Smith, during the time herein pertinent) and Alfred H. Smith, to cheat and defraud the State of Delaware by obtaining money by false pretenses from the Delaware State Highway Department, in that he and one or more of the aforesaid conspirators, knowing that the said Alfred H. Smith, was under contract with the said Department pursuant to contracts numbered 2100, 2133, 2135, and 2137, wherein it was provided that the said Smith should supply to the said Department various shipments of liquid asphalt to be paid for by the said Department on the basis of certain certified weight slips to be supplied to the said Department by the said Smith or his agents, did conspire, confederate, and agree with one or more of the aforesaid conspirators to deliver or cause to be delivered (and in certain instances did deliver) to the said Department various shipments of liquid asphalt which would be



of less quantity by weight than would be reflected on the said certified weight slips which would be provided (and in certain instances were provided) to the said Department along with the various short weighted shipments, with the intent that the said Department should pay the said Smith for the quantity of weight shown on the respective certified weight slips, which quantity would be greater than the quantity actually delivered to the said Department, all to the detriment of the said Department, and the State of Delaware, against the Law, and Peace and Dignity of the State, in violation of 11 Delaware Code § 105.

WHEREFORE, the said John Behen Maybee prays that the said Roman E. Scarlett may be Forthwith apprehended and held to answer to this complaint, and to be further dealt with as the law directs.

Sworn to and subscribed before me this  
1st day of August A. D. 1964

s/ Maurice W. Carrow  
Justice of the Peace

s/ John Behen Maybee  
Complainant

WHEREAS, the foregoing complaint having been made, as aforesaid, you are hereby commanded, in the name of the State of Delaware, to take Roman E. Scarlett and bring him before me, or some other Justice of the Peace of the County, Forthwith, to answer said charge. And you are hereby likewise required to summon C. Richard Vaughn to appear and give evidence relative to the said charge; and have you then and there this Writ.

Given under my hand this 1st day of August A. D. 1964.

s/ Maurice W. Carrow (SEAL)  
Justice of the Peace

(Complaint and Warrant)



---

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

---

STATE OF DELAWARE )  
 )  
 ) Petitioner, )  
 ) § )  
 vs. )  
 )  
 ROMAN E. SCARLETT, )  
 )  
 ) Respondent. )  
\_\_\_\_\_

Requisition No. 21-64

Washington, D. C.,  
November 18, 1964.

The above-entitled matter came on for hearing before The Honorable MATTHEW F. McGUIRE, Chief Judge, at two o'clock p.m.

[2] TRANSCRIPT OF PROCEEDINGS

THE DEPUTY CLERK: In the matter of the State of Delaware versus Roman E. Scarlett, Requisition No. 21-64.

MR. FREDERICKS: If the Court please, my name is Barry Fredericks, Assistant United States Attorney. We are ready to proceed.

MR. BONNER: Your Honor, my name is Walter Bonner and I represent Roman E. Scarlett, Respondent.

THE COURT: This is the matter of Roman E. Scarlett, Requisition No. 21-64. I have examined the Governor's papers charging the defendant with conspiracy and fraud in the State of Delaware. I find the papers are in proper order and am prepared to proceed with the extradition hearing. Have you seen these papers, Mr. Bonner?

MR. BONNER: I have not seen the papers and I would like very much to examine them at this time, Your Honor.

THE COURT: There appears to be a suggestion of extradition, on the part of John B. Maybee, a Deputy Attorney General, of the State of

Delaware, of Roman E. Scarlett on the charge of conspiracy to defraud and cheat the State of Delaware by obtaining money under false pretenses. From my examination of the papers they appear to be in proper form.

MR. BONNER: Will Your Honor indulge me a few minutes, please. Thank you, Your Honor.

[3] THE COURT: Let me ask you a question, Mr. Bonner. Is the individual in question before the Court one Roman E. Scarlett? Is he physically present in Court?

MR. BONNER: He is, Your Honor.

THE COURT: All right.

MR. BONNER: Your Honor, pursuant to the provisions of Title 23, 401, of the District of Columbia Code I am asking Your Honor at this time to stay the execution of your Order so that we may file a petition for a Writ of Habeas Corpus.

THE COURT: What is the predicate you desire to lay for the Writ?

MR. BONNER: This is an illegal detention.

THE COURT: Predicated upon what?

MR. BONNER: Predicated on the fact, Your Honor, that (1) this man did not conspire in the State of Delaware at this time and place with the persons named in those papers in that the persons named in the papers were not in the State of Delaware at the times alleged.

This is a conspiracy situation, as Your Honor may note. This is an unusual case. It is a conspiracy charge brought primarily against a man known as Alfred H. Smith. This man, to my knowledge, is the President —

THE COURT: Wait a minute. This man also is [4] named as a defendant in that case, is he not?

MR. BONNER: That is correct.

THE COURT: All right.

MR. BONNER: This gentleman is, I understand, the head of a number of companies; President of the Citizens Bank of Maryland and, at

the particular time and place that this alleged offense took place was President of the Alfred H. Smith Asphalt Company which had contracts with the State of Delaware to do certain road paving.

The gentleman who is here with me, Mr. Scarlett, is simply a truck driver for that company.

THE COURT: I am not concerned with that. I am only concerned with whether Mr. Scarlett was present in the State on the date in question.

MR. BONNER: Mr. Scarlett was present in the State on the date of August 28th but the papers before you cite (a) In order to have a conspiracy it takes more than one.

THE COURT: I understand.

MR. BONNER: If Your Honor will note, it states that Mr. Scarlett conspired with one of several individuals, naming about ten of them, and with Mr. Smith.

I am stating there could not be a conspiracy and there is not an offense charged because these people were not in the State at that time. [5] As a matter of fact, in 1963, the State of Delaware took it upon itself to originally arrest Mr. Scarlett, this truck driver, and they charged him, along with others, with a similar offense against this truck driver for this company and finally the State of Delaware itself, through a Delaware Judge, threw the case out because it did not state a charge or cause of action.

Your Honor, we have got a man here who lives in the District of Columbia, who has been living here for seven years and has a family here. He works regularly. He is not a habitual criminal and I am stating that the moving papers —

THE COURT: Wat a minute. The question whether he is a habitual criminal or not is not material. I am not concerned with that.

I am concerned with two things: Are these papers in proper order and is he the individual named in the papers and I understand he is.

MR. BONNER: Your Honor, the papers are not in order. What



Your Honor would be doing is to allow this man to go into the State of Delaware on a charge where there is no crime at all when the other individuals were not in the State.

What I want to show in a petition for a writ of habeas corpus is that very fact and I think we are entitled [6] to do that. That is one of the primary things. They have had this poor man once, but now twice —

THE COURT: I cannot go into the merits.

MR. BONNER: You can go into whether or not there is an offense charged and then a Judge of this Court should hear our motion for a writ of habeas corpus. If there is no offense charged, he cannot be extradited.

THE COURT: Your reason for saying if there is no offense charged the individual here, Roman Scarlett, cannot be extradited is because the other individuals named were not in the State of Delaware at the time of the charged conspiracy?

MR. BONNER: It is. They state that:

"On or about the 28th day of August 1963 in Milford Hundred, County of Kent, State of Delaware, and at various and diverse other times" — whatever that means — "during the Spring and Summer months of 1963, in Kent County, Delaware, as well as in Sussex County, State of Delaware, and the State of Maryland, while being employed as a truck driver for Alfred H. Smith, Roman E. Scarlett did then and there unlawfully conspire, confederate, and agree with one or more of the following persons (as well as with various other persons not now known), to wit: Edgar D. Standridge, Henry C. Standridge, Henry Burris, Frank Burris, James C. Fulford, Burlan F. Walters, Charles E. Kidwell, William T. Kidwell, George W. Strawn and Alfred H. Smith" — the President of the Company involved in this case — "to cheat and defraud the State of Delaware by obtaining money by false pretenses."

In the first place, the men named, in the main, were not in that State. I think that the State of Delaware would be honest enough to state that this man never received any money from the State of Delaware.

THE COURT: The first element before me is whether there is a valid charge. That can be determined by the extradition papers. I find that to be a fact, as a matter of law.

The only other matter left is the question of fugitivity and he admits that he is in the District of Columbia and is the individual named therein and I call your attention to the papers which state; in paragraph (3):

"That on 28 August 1963 Roman E. Scarlett was apprehended by the Delaware State Police with a short load of liquid asphalt destined for a Delaware State Highway project, as a result of which he was arrested by the Delaware State Police in Kent County, Delaware on a charge of attempted fraud. He was [8] then taken before a Magistrate and placed under bond for his later appearance in the Kent County Court of Common Pleas to answer to said charge. At a later date he did so appear before said Court, was arraigned and entered a plea of not guilty. Subsequent to that his Delaware counsel filed a motion to dismiss the information and in support of said motion, a brief was filed. Thereafter, upon consideration by the undersigned, out investigation into the over-all case having just begun, it was decided to enter a nolle prosequi to the aforesaid of attempted fraud.

"This was then done and Scarlett was released from his bond. In the meanwhile, the investigation continued. This investigation covered many months.

"Finally, on 1 August 1964, the undersigned procured from a Magistrate in and For Kent County, Delaware, various warrants for the arrest of Scarlett and his ten co-conspirators. These warrants were procured at the earliest practicable date

considering the nature of the case and the difficulties encountered in the investigation.

"That Scarlett has not returned to the State of Delaware subsequent to his aforesaid arraignment before the Court of Common Pleas on the attempted fraud charge, and on leaving this State after said arraignment has remained away from this State with knowledge that he was wanted in this State for the aforesaid crime of conspiracy to cheat and defraud, and thus he has fled the jurisdiction of this State to avoid prosecution herein and has remained a fugitive from the State of Delaware, having fled to the City of Washington, District of Columbia."

Then the next paragraph is to the effect that he was apprehended here on a fugitive warrant.

MR. BONNER: I would like to read something to Your Honor, if I may.

THE COURT: Very well.

MR. BONNER: I am reading from a document entitled:

"COURT OF COMMON PLEAS FOR KENT COUNTY  
STATE OF DELAWARE :

vs.

: No. 7759

ROMAN EUGENE SCARLETT :

September A.D. 1963"

I don't have this before you, Your Honor.

THE COURT: I am listening.

MR. BONNER: (continuing):

"Information: Violation of  
Title 11, Section 105 of the  
Delaware Code of 1953, as  
amended.

"David P. Buckson, Attorney General of the State of Delaware, by Merrill C. Trader, Assistant Deputy Attorney General of the State of Delaware, now here in the Court of Common



Please for Kent County in the State of Delaware, now sitting in and for Kent County aforesaid, Information makes;

"That Roman Eugene Scarlett, late of Washington, D. C., on or about the 27 day A. D. of 1963, did then and there unlawfully attempt to cheat and defraud the State of Delaware and the State Highway Department of the State of Delaware by falsely and fraudulently representing to the agents of said Department that various invoices received from the Humble Oil Company actually reflected the quantities of asphalt delivered to said Department in performance of Contract #2133 when in fact said invoices reflected greater quantities than those actually delivered, with the intent that the said Department and the State of Delaware should pay the Albert H. Smith, Jr., for a quantity of asphalt in excess of that actually delivered in violation of Title 11, Section 105 of the Delaware Code of 1953, as amended."

If Your Honor will continue to hear me, I will appreciate it.

[11] This man was arrested in August of 1963 and I think it is important for you to know for a habeas corpus hearing that he is a truck driver with no interest in the company whatsoever. When he was arrested he was taken by the Maryland authorities and questioned for seven solid hours and when they were through he was informed by the Deputy Attorney General, after seven hours of questioning, that he had better cooperate with them for they would walk on top of him to get to this company.

That case was thrown out by the Court in Delaware and now they are back here harrassing this little man.

THE COURT: I find the papers are in proper order. Cheating the State of Delaware is a crime in that State as it would be a crime here so I order him rendited. .

MR. BONNER: I understand that pursuant to the language of Title 23, Section 401, that we shall be granted a reasonable time in which to file a petition for a writ of habeas corpus —

THE COURT: I am ordering him rendited. What you do is your business.

MR. BONNER: Your Honor —

THE COURT: I am not sitting as a Court, —

MR. BONNER: I appreciate that but it states in this section, as Your Honor well knows —

[12] THE COURT: Mr. Bonner, what you have raised goes to the controversy between this gentleman and the State of Delaware. I cannot resolve that.

MR. BONNER: I appreciate you can't and I do not ask you to do it. I know you sit as Governor under this Section of the Code.

THE COURT: I will not entertain a motion for a writ of habeas corpus.

MR. BONNER: I do not ask you to.

THE COURT: What do you ask me to do?

MR. BONNER: I ask that you, sitting as Governor, shall fix a reasonable time within which to allow us to file a petition for a writ of habeas corpus.

THE COURT: I will give you an hour to do it.

MR. BONNER: Your Honor, will you allow us three hours?

THE COURT: One hour.

MR. BONNER: Will Your Honor give me until 4 o'clock?

THE COURT: One hour. Thank you very much.

(Thereupon, at 2:25 o'clock p.m. the hearing was concluded.)



ORDER TO SURRENDER

Before the Chief Judge of the District Court of the  
United States for the District of Columbia

---

In re

The State of Delaware

vs.

No. 21-64

Roman E. Scarlett

Requisition Docket

The Governor of the State of Delaware having made his demand for the person of said defendant, and said defendant having been arrested and brought before me by the United States Marshal for said District, upon warrant issued herein by virtue of the authority vested in the Chief Judge of the said Court by act of Congress, and being satisfied, after a hearing duly had, that the prisoner is the identical person mentioned in said requisition, it is therefore, the 18 day of November, 1964, ordered that the said Roman E. Scarlett be surrendered to W. Deane Johnston or George F. Schmalhofer, the Agent of said State, by him to be conveyed to the County of Kent, in said State, there to answer the charge of conspiracy to defraud, set forth in said requisition.

Matthew F. McGuire  
Chief Judge

[Filed November 18, 1964]

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

ROMAN E. SCARLETT

Petitioner

v.

LUKE MOORE

United States Marshall  
for the District of Columbia

Respondent

Habeas Corpus No. 453-64

To The Honorable United States  
District Court for the District of Columbia

The petition of Roman E. Scarlett, by and through Walter J. Bonner, his attorney, respectfully shows:

1. Petitioner makes application herein for a writ of habeas corpus in that he is being unlawfully detained pending extradition to the State of Delaware.

2. Petitioner alleges that the moving papers filed herein by the State of Delaware do not properly recite a crime under the laws of said State, upon which the extradition requested by said State may be granted under the facts and circumstances of this case.

3. No other application for this writ has heretofore been made to any other Court or Judge.

4. And for such other and further reasons as will be brought to the attention of the Court in the hearing of the petition.

WHEREFORE, petitioner prays that a writ of habeas corpus issue herein directed to the said Luke Moore, United States Marshal for the District of Columbia, commanding him to produce the body of the peti-

tioner, Roman E. Scarlett, before this Court at a time to be specified in said writ, to the end that this Court may inquire into the cause of the petitioner's detention, and that the petitioner be ordered discharged from the restraint and detention aforesaid.

CARR, BONNER, O'CONNELL,  
KAPLAN & SCOTT

By Walter J. Bonner  
Attorney for Petitioner

[Certificate of Service  
18 November 1964]

---

[Filed November 19, 1964]

RETURN AND ANSWER TO RULE TO SHOW CAUSE

Comes now the respondent, Luke C. Moore, United States Marshal for the District of Columbia, by his attorney, the United States Attorney in and for the District of Columbia, and makes the following return and answer to the rule to show cause:

1. On November 18, 1964, Roman E. Scarlett was permitted to file a petition for a writ of habeas corpus in which he alleges that he is illegally detained in that Governor's papers from the State of Delaware, which are the basis of his being ordered extradited to that State, are defective in that they fail to recite a crime under the Laws of said State.
2. The respondent admits that the petitioner is presently in his custody but denies that such detention is illegal.
3. (Factual Statement). Petitioner was arrested in the District of Columbia on September 3, 1964 on a charge of Fugitive from Justice, based on a warrant issued on August 1, 1964 in Kent County, Delaware, charging the petitioner with conspiracy to defraud the State of Delaware.



On September 3, 1964 petitioner appeared before a Judge of the District of Columbia Court of General Sessions and the matter was continued pending the receipt of the State Papers.

On November 18, 1964 petitioner appeared before the Chief Judge of the United States District Court for the District of Columbia on an hearing of extradition. After consideration of the Governor's papers from the State of Delaware and argument of counsel, the Chief Judge ordered that petitioner be surrendered to the demanding state.

The instant petition followed.

4. Petitioner alleges that the Governor's papers from the State of Delaware do not recite a crime under the Laws of that State. This contention is without merit. 11 Delaware Code 105 makes conspiracy to commit a crime a crime in itself and it has been so held by the Delaware Courts. State v. Cole, 31 Del 279, 114 A 201 (1921); State v. Effer, 25 Del 92, 79 A 411 (1910); State v. Hardesty, 14 Del 536, 33 A 310 (1891). Obtaining money by fraud or false pretenses is a crime in the State of Delaware (11 Delaware Code 554). Therefore a conspiracy to obtain money by false pretenses is also a crime. It is this crime of which the petitioner is charged. The elements of this crime are alleged and set forth in the Governor's papers. (See paragraph 2 of affidavit of Deputy Attorney General John B. Maybee, dated November 17, 1964.)

It is noted that the guilt or innocence of the petitioner as to the crime charged is not an issue to be considered on an hearing for extradition nor a writ of habeas corpus challenging the propriety of the order of extradition. The Court may consider only whether the petitioner is a fugitive from justice and whether the demanded person has been substantially charged. Munsey v. Clough, 196 U.S. 364, 372 (1905); Bruzard v. Matthews, 93 U.S. App. D.C. 47, 207 F.2d 25 (1953); Fowler v. Ross, 90 U.S. App. D.C. 305, 310, 196 F.2d 25, 30 (1952); Johnson v. Matthews, 86 U.S. App. D.C. 376, 378, 182 F.2d 677, 679 (1950). In the instant case it is clear from the record that petitioner was in fact a fugitive from justice and was substantially charged; thus the order of extradition was proper.

WHEREFORE, the respondent prays this Honorable Court dismiss the petition for a writ of habeas corpus and discharge the rule to show cause.

/s/ David C. Acheson  
United States Attorney

/s/ Charles T. Duncan  
Principal Assistant United States  
Attorney

/s/ Oscar Altshuler  
Assistant United States Attorney

/s/ Barry L. Fredericks  
Assistant United States Attorney

[Certificate of Service]

---

[Filed November 18, 1964]

HABEAS CORPUS

United States District Court  
FOR THE  
DISTRICT OF COLUMBIA

H.C. 453-64

To LUKE MOORE,  
United States Marshal

YOU ARE HEREBY COMMANDED, to have the body of ROMAN E. SCARLETT by you restrained of his liberty, as it is said, by whatsoever names detained, together with the day and cause of his being taken and detained, before the Honorable Wm. B. Jones, Judge of the United States District Court for the District of Columbia, at the court room of said Court, in the City of Washington, D. C., at 10:00 o'clock a.m., on the 19th day of November, 1964, then and there to do, submit to and receive

whatsoever the said Judge shall then and there determine in that behalf;  
and have you then and there this writ.

WITNESS the Honorable Matthew F. McGuire, Chief Judge  
United States District Judge at Washington, D. C.,  
this 18th day of November, A. D. 1964,

HARRY M. HULL, Clerk

[Acknowledgment of Service  
19 November 1964]

---

PROCEEDINGS

Washington, D. C.

Thursday, November 19, 1964

The above-entitled matter came on for hearing on a petition for a writ of habeas corpus before the HONORABLE EDWARD A. TAMM, United States District Judge.

TRANSCRIPT OF PROCEEDINGS

[3] THE DEPUTY CLERK: No. 16, Scarlett versus Moore.

MR. FREDERICKS: May it please the Court, my name is Barry Fredericks. I am Assistant United States Attorney here to represent the respondent, Luke C. Moore, United States Marshal for the District of Columbia.

I would like at this time to introduce to the Court Mr. John Maybee, Deputy Attorney General of the State of Delaware, who is also sitting at counsel table.

THE COURT: I assume that the pleading which you have filed entitled, "Return and Answer to Rule to Show Cause" is in fact a return to the Writ of Habeas Corpus which was issued.

MR. FREDERICKS: That is correct.

THE COURT: I assume that the Government takes no antagonist's



position towards the fact that the writ of habeas corpus was not served on the Marshal in accordance with the terms of the statute.

MR. FREDERICKS: No, Your Honor, we do not object. I informed Mr. Moore that I had received a copy in his behalf and he was perfectly agreeable to that.

THE COURT: Very well. You are the movant. You may proceed.

MR. BONNER: Thank you. Will you indulge me for [4] one moment?

THE COURT: Certainly.

(Short pause in proceedings.)

MR. FREDERICKS: Your Honor, I have a copy of the Delaware Code which is referred to in the Government's return and answer if the Court wishes to see the sections of the Code which the Government has referred to.

THE COURT: The Court will utilize the volume. Give it to the clerk.

MR. FREDERICKS: I have marked the sections. The yellow slips are where the sections are to be found.

THE COURT: Very well.

(Document handed to the Court.)

THE COURT: I assume that the Chief Judge has signed papers for interstate rendition of this petitioner.

MR. FREDERICKS: That is correct, Your Honor.

THE COURT: Very well.

ARGUMENT IN SUPPORT OF PETITION FOR WRIT

MR. BONNER: May it please the Court, my name is Walter J. Bonner and I am the attorney representing the petitioner, Roman E. Scarlett in this habeas corpus action.

The petition for writ of habeas corpus, Your Honor, grows out of a requisition by the Governor of the State of Maryland, requesting the District of Columbia authorities —

[5] THE COURT: The Governor of the State of Maryland?

MR. BONNER: I beg Your Honor's pardon. The Governor of the State of Delaware, requesting the District of Columbia authorities to turn over to his agents or representatives the person of the petitioner Roman E. Scarlett.

Pursuant to that requisition, there was held in this court yesterday before the Chief Judge an extradition proceeding under Title 23, Section 401 of the District of Columbia Code. At the close of that hearing, the Chief Judge of this Court, sitting as a Chief Executive, ordered the petitioner extradited.

Immediately thereafter, counsel requested, again pursuant to Title 23, Section 401 of the District of Columbia Code, that he be allowed to file a petition for writ of habeas corpus so that he might test this matter.

The statute, as Your Honor knows, provides in part — and I quote: ". . . and if such person or his counsel shall state that he or they desire to test the legality of his arrest, the judge shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus."

At first the Chief Judge denied us any time. That matter, of course, is at the moment moot for in due course, because counsel proceeded in his argument, the Chief Judge allowed counsel one hour —  
[6] THE COURT: You are here. I don't think this background makes any difference.

MR. BONNER: I only think it is for this reason, Your Honor, because the matter may be subject to review; and I will be very brief on this point. Because the matter may be subject to review and recognizing that there may be technical deficiencies in the petition itself, the reason for those deficiencies is because of the pressure put on counsel, the fact that we had but one hour and the fact that the Delaware authorities were waiting downstairs to remove Mr. Scarlett if the papers were not filed within the hour. Fortunately, they were filed four minutes before the hour expired. We did serve the U. S. At-



torney, we did serve the Deputy Attorney General, and I served Mr. Moore personally. Unfortunately, it was too late to get hold of the Coroner to do it as I believe the statute requires.

Now, with that, Your Honor, I will turn to the petition itself. In the petition, in paragraph 2, we have stated: Petitioner alleges that the moving papers filed herein by the State of Delaware do not properly recite a crime under the laws of said State, upon which the extradition requested by said State may be granted under the facts and circumstances of this case.

We have also stated in paragraph 4: And for such [7] other and further reasons as will be brought to the attention of the Court on the hearing of the petition.

Again, had we had more time, we would have set forth these reasons in the petition. I would like to set them forth now:

There are two major thrusts being made this morning by the petitioner, the very thrusts upon which he rests his case, the first of which is that there has been such a basic denial to him of his constitutional rights by the authorities of the State of Delaware growing out of this case that the Court in weighing those constitutional rights as opposed to the rights normally accorded to a sovereign state requesting the body of an individual to be turned over to them, they having shown for the record that their moving papers are in order, that he is the person and that he is a fugitive, that the Court in choosing between those two rights should choose the rights of the petitioner, his individual rights, and release him today.

Secondly, we will address ourselves then specifically to those allegations set forth in paragraph 2 of the petition.

Now, Your Honor, in court today is the petitioner, of course. Also in court are two witnesses. The statements I am now about to make to Your Honor, I am prepared to bring forth under sworn testimony on the stand. Recognizing that my petition may be somewhat technically deficient for the [8] reasons I have previously stated, I ask that the remarks

I am now making to Your Honor be made part of that petition, incorporated in it and you consider them as such.

On August the 28th of 1963, Mr. Scarlett who was a resident of the District of Columbia and who was an employee of the Alfred H. Smith Asphalt Company, or Asphalt Division as I believe it is technically known, was arrested in the State of Delaware at approximately four o'clock in the morning. He was questioned for some time on a roadway. Inevitably, he was taken to a police barracks and from approximately six o'clock in the morning until approximately one o'clock in the afternoon, he was continuously questioned by Delaware Police authorities and by a Deputy Attorney General of that State.

During that period, this man, who was suffering from a very serious case of diabetes, who needed his medicine at approximately six or seven o'clock that morning, did not receive that medication. In fact, no medicine was received by him until approximately noon. He was not fed. He did not go to the bath room. And during the course of this intensive interrogation, he was informed by the Deputy Attorney General of the State of Delaware that they had no interest in him but that they would walk all over the top of him in order to get to the head of this organization.

Now, this case grows out of an alleged conspiracy. [9] Mr. Alfred H. Smith, among other things, is a contractor. He builds roads. He was given a contract, one of several, I understand, by the State of Delaware to lay asphalt on their roads. It is the opinion, allegedly, of the office of the Attorney General of Delaware that he conspired to defraud them of certain moneys by not doing this road work in a certain order required.

Mr. Scarlett is a very humble truck driver. He is not an owner of this company. He owns no interest whatsoever in it. He simply drives a truck.

Now, as I have stated to you, he was picked up at four o'clock in the morning in Delaware. In fact, he was not released until six o'clock that night when friends of his attempted to gain information in order to ob-

tain him a lawyer, in order to set a bond. They were informed by a magistrate of the State of Delaware to get out of his office.

This man was accorded no rights whatsoever. He was not informed, from the time he was arrested at four o'clock in the morning until the time he was released, that he had ever committed any crime whatsoever. He was never informed of any rights he might have.

Inevitably, after this long detention under the very bad circumstances I have outlined to you, he was released on bond at approximately six o'clock that night. In due course, I understand, papers were drawn by the State of Delaware charging him with a conspiratorial offense. Those papers were so defective — and this was in September, now, of 1963 — were so defective that counsel, who inevitably was retained by or appointed for this gentleman in Delaware, filed an appropriate motion before a Delaware court and a Delaware court in February, this time with the agreement of the Attorney General himself, dismissed that indictment or that charge. I have a copy of that matter here. I would like to make it part of the record, if I may.

(Document submitted.)

MR. BONNER: Sometime between February, 1964, when this charge was inevitably thrown out, and August of this year when, as stated in the Government's answer, a warrant was issued here in the District of Columbia, a fugitive warrant, and this man was again brought into custody — but between February of 1964 and August of 1964, this man, while in his home one night, was again accosted by Delaware officials. They were in the State of Maryland. There were no Maryland officials with them, and they invited him to come out to Maryland and to talk to them again in a motel they had provided for themselves.

Police officers from Delaware were again present and a member of the Attorney General's staff. They sent a car [11] into the District of Columbia to pick him up. He went with them. He didn't want to. He was afraid that if he did not go, they would again put him through the same rigmarole that they had put him through back in the late summer



and early fall of 1963, so he proceeded into Maryland with these Delaware officials, no Maryland official being present, and again they questioned him in a motel room.

Inevitably, this second charge developed. Again Roman Scarlett was charged with conspiracy.

In the moving papers of the State of Delaware, they charge that he along with five or six or seven other employees of this organization and Mr. Alfred Smith, who was the head of the organization, conspired together to defraud the State.

We are not making a representation before Your Honor that conspiracy is not a crime in the State of Delaware; we agree that it is. What we are stating is this: Over and above the basic denial of this man's constitutional rights in the periods I have just mentioned to you, the very moving papers of the State itself in attempting to state a crime under their laws, do not in fact state one.

In other words, we are dealing here, from August 1963 to date, with a simple case of harassment and persecution of a very little man who has nothing to do with this situation whatsoever and which the State of Delaware, through its own [12] Deputy Attorney General, has recognized but has said to him, We are not interested in you but we'll walk all over the top of you to get the man who owns this company.

Now, the man who owns this organization is one of the people mentioned, as I stated, in these moving papers, Alfred H. Smith.

Again, it states that Roman Scarlett and one or more of the following persons — and it names them — and Alfred H. Smith, did conspire, et cetera.

I am prepared to place on the stand before Your Honor today Mr. Smith himself to swear under oath that he was never in the state on the date in question or any of these so-called diverse dates, which they don't mention. They use the language "and at various and diverse other times" — whatever that means, I don't know. It's kind of vague. But he will swear that during the spring and summer months of this year,

1963, and on the particular date in question, he was not in that State.

I have another witness here to take the stand and swear in corroboration of that. And it is my opinion — and it can only be that at the moment — that out of the four or five Delaware officials who are here today, police officers and a Deputy Attorney General of that state, not one of them can take that stand and swear to God under oath that Mr. Smith [13] was in that state.

And if they can't do it, there can't be a conspiracy because their own moving papers stating the conspiracy — again which I acknowledge to be a crime — state that this man was part of that conspiracy, that he was in the state. I say they can't take the stand and say that. These papers are totally defective.

And again, based upon Mr. Scarlett's treatment by those authorities, which I am only giving you the bare bones of it — he is ready to take the stand and give it to you in detail — from August of 1963 forward, the only purpose in bringing this charge against him again is to harass him and persecute him and use him.

And, Your Honor, in the case of Johnson v. Matthews which is found at 86 U.S. App. D.C. 376 —

THE COURT: You mean Appeals D.C.

MR. BONNER: Appeals D.C. — excuse me, Your Honor.

— and at 182 Federal 2d 677, there is an opinion by the now Chief Judge of our Court of Appeals, Judge David Bazelon, which reads as follows and which I believe is destined to become the law —

\* \* \*

I read from page 384 of the United States Appeals [14] decision:

"The obvious importance of the federal system, and the desire to facilitate its workings, should not obscure the fact that action in pursuance of one constitutional power may run afoul of another. Unless the Constitution is read as a whole, there is grave danger that the extradition process will be executed in unduly mechanistic fashion and in complete dis-

regard of the fundamental considerations of humanity and decency which are reflected in the Bill of Rights. Certainly, the interest of the various governments of our federal system in the orderly workings of the extradition machinery is a factor of moment. And in such interest, it may ordinarily be desirable to limit the inquiry on habeas corpus to the three or four traditional questions posed in such cases. But where one constitutional purpose must be weighed against another — one promoting efficiency and comity between the states, the other protecting fundamental rights of the individual against state infringement — our system of government will be better served by assessing greater weight to the latter."

Now, in formulating his opinion, Your Honor, Judge Bazelon cited from the case of *Johnson v. Dye*, which is a case to be found at 175 Federal 2d, page 250, a case growing [15] out of the Third Circuit. And, Your Honor, in that case the petitioner complaining was a fugitive from the State of Georgia complaining of cruel and harsh treatment and claiming a violation of his constitutional rights. Of course, the argument made there by the authorities was, This is not the place to question this. All we are concerned with today is: Are the moving papers in order, and is this the man, and is he a fugitive?

The Court in the Third Circuit said, We can't close our eyes to this claim of cruel and unjust punishment. We can't close our eyes to the fact that a man's individual rights have been stepped upon simply because the Constitution also calls upon us to turn over under these very mechanistic proceedings the body of this man to a state when they have fulfilled these three simple requisites. And the Court refused to turn over the body of this man to the State of Georgia for the reason cited, because they found that there had been a fundamental and basic infringement of his constitutional rights.



The Court stated in part on page 256 of that opinion:

"It follows, therefore, that Johnson must be set at liberty for the State of Georgia has failed signally in its duty as one of the sovereign States of the United States to treat a convict with decency and humanity."

[16] We maintain in this case, Your Honor, that through the testimony of the people we have brought here and based upon the statements I have made to you this morning, that not only does this paper not state a crime due to its very wording but more than that because of the course of conduct by the Delaware authorities, which I have simply outlined to you this morning, there has been such an invasion of this man's basic rights, he has been treated so badly, so poorly by a sovereign State that it is clear the only reason they are bringing this action again is to continue harassing him and persecuting him so that he will give them the cooperation he does not have to give them.

Under those circumstances, Your Honor, and based upon Judge Bazelon's statements in the Johnson case, and based upon the attitude of the Court in Johnson v. Dye, we request Your Honor to allow Mr. Scarlett to go free today.

#### ARGUMENT IN OPPOSITION TO PETITION FOR WRIT

MR. FREDERICKS: May it please the Court, counsel in his argument this morning appears to concede that the papers themselves do in fact state a substantial charge. He also appears to concede that his petitioner is in fact a fugitive from that state.

At the time of the hearing on extradition, counsel did not challenge the sufficiency of the crime charged but, as [17] he has stated, directed the basis of his argument to the question of his right to file a writ of habeas corpus.

As the State of Delaware has set forth in its papers, specifically the affidavit supplied by Mr. Maybee, the Deputy Attorney General, this petitioner is wanted as part of the conspiracy to defraud the State.

If I might digress for a moment and give the Court some brief

background of the nature of this conspiracy: Mr. Smith, the employer of this petitioner, was involved in constructing roads for the State of Delaware. He would receive his liquid asphalt from Humble Oil Company in Maryland; that at this time, he would receive a bill of lading as to the contents or the amount of liquid asphalt in the trucks which were subsequently delivered to Delaware; that when he left the Humble plant in Maryland, the drivers of these trucks went on to Mr. Smith's plant in Branchville, Maryland; that they siphoned off a sufficient amount of this liquid asphalt and then went on to Delaware where they delivered the liquid asphalt, using the contents in the bill of lading received from Humble Oil as a certificate of the amount of liquid asphalt in the truck.

The petitioner, on the 28th day of August, delivered such a truck. The State of Delaware at that time weighed the [18] truck and found that the contents of that truck were far below the contents of the bill of lading that the petitioner presented as the true contents of the truck.

It is true that this petitioner was arrested in the State of Delaware at that time. It is not true that he was questioned for the length of time suggested by his counsel.

It is true that the man was charged at that time with the crime of attempting to defraud the State.

It is true that at a subsequent time, this matter was dismissed. But, as set out in his petition by the Deputy Attorney General of the State, the matter was dismissed, nol-prossed by the movement of the Government solely for the reason that they were beginning to investigate this entire process and they did not feel at that time it was in the best interest of the State of Delaware to proceed with the prosecution of this individual and that they dismissed the matter so that it would not hamper them in their investigation and gathering further information as to the entire scheme and conspiracy which was later charged and is the subject of this man's request for interstate rendition.

\* \* \*



[19] Now, counsel contends that the papers are defective because they do not state a crime only because he is willing to offer testimony that Mr. Smith and other co-defendants were not in the State of Delaware at the time charged. This allegation, Your Honor, the Government contends relates only to the ability of the State of Delaware to successfully prosecute these individuals when returned to the State of Delaware; it does not go to the question of whether the individual has been substantially charged.

In fact, what the petitioner is attempting to do is raise the question of the guilt or innocence of this defendant at the extradition hearing and here by way of habeas corpus. It is not a question for this Court to decide as to whether or not the State of Delaware will be successful in sustaining their burden of proof at the time of the prosecution.

The Government points this out in its return and answer. It wishes to call the Court's attention to the [20] Bruzard opinion which is cited in its brief, and quoting from page 2 of the slip opinion: "...the governor of the asylum State has for decision the legal question whether the demanded person has been substantially charged with a crime and the factual question whether he is a fugitive from justice." This is the only question which was before Chief Judge McGuire sitting as Governor. This is the only question which is present before this Court on a writ of habeas corpus.

The opinions of the Court of Appeals in this Circuit are numerous as to the fact that the judge sitting on a writ of habeas corpus should not overturn the finding of the Chief Magistrate sitting as governor where there is some evidence to support his finding. We believe that in this case, the petition filed as part of the Governor's papers is more than adequate evidence to show that there is a substantial crime charged.

I would like to call the Court's attention to a recent order which has been handed down by the Court of Appeals of this Circuit in Miscellaneous No. 2409, Johnette Moncrief v. Sam A. Anderson. In that

order, the Court, discussing the very type of case we have before us — I am now reading from page 2 of that order, "that the rationale for sustaining the executive finding if at all supported [21] appears to be that of non-fugitivity," — which is not in issue here — "the essential alibi defense, and habeas corpus is not the proper proceeding to try the question of guilt or innocence of the accused." In that order, the Court cites the Supreme Court decision *Hyatt v. Corkran*, 188 U.S. at page 710.

The petitioner, by raising the question of the presence of Mr. Smith and these other persons named, raises the question of guilt or innocence; the question of whether the State of Delaware can support the conviction at time of trial. This is not an issue here before this Court. The only issue before this Court is whether this defendant is a fugitive and whether he has been substantially charged in the Governor's papers.

We feel that the finding of the Chief Executive that he has been so charged and that he is a fugitive, which is supported by his petition, should not be overturned.

Counsel makes an adjunct argument relating to a violation of constitutional rights. He has made no allegation of violation of constitutional rights as it relates to this case; his allegation relates only to a violation of an alleged constitutional right in a prior proceeding. The Government contends that his allegation is not in fact based on the Constitution of the United States but is by some way tied or [22] an attempt to tie it to Rule 5(a) of the Federal Rules of Criminal Procedure, which do not apply to the State of Delaware. There has been no showing of any violation of constitutional right, certainly not as it relates to the charges for which the State is asking that this man be surrendered.

He cites us a case from the Third Circuit which deals with the surrender of a prisoner who makes an allegation of cruel and unusual punishment while he was incarcerated in that state and to which the return of his incarceration proceed. That case is not applicable here.

He has shown no overriding constitutional right which would for any reason take this case outside the mainstream of the opinions of the Court of Appeals in this Circuit and the United States Supreme Court which state that habeas corpus proceedings consider only the two questions which I have previously stated: the question of substantial charge, which counsel appears to concede and which is clear from both the statutes of the State of Delaware, the petition filed by that State and the Government's answer; and the question of fugitivity which is also clear from the Governor's papers.

Therefore, the Government contends, the respondent contends that this Court should not overturn the finding of the Chief Executive and that this man should be duly surrendered to the State of Delaware upon the filing of these proper [23] Governor's papers and upon the order of the Chief Executive of this Circuit ordering that he be so surrendered.

Thank you.

THE COURT: I didn't know whether you wanted to consult the representative of the State of Delaware before you concluded.

(Short pause in proceedings.)

MR. FREDERICKS: We have nothing further to add, Your Honor.

Thank you.

MR. BONNER: Nothing further, Your Honor.

#### ORAL RULING OF THE COURT

THE COURT: In these cases, which are improperly referred to as extradition cases in the District of Columbia but are actually interstate renditions, it is the responsibility of this Court to determine whether three facts are established to the satisfaction of this Court. First, the identity of the defendant. Second, the jurisdiction of the requesting Court. And third, a showing of probable cause that an offense has been committed violating the laws of the requesting State.

Normally, these factors are established by the extradition papers.

It is not the function of a writ of habeas corpus [24] in a case of this kind to bring before the Court any questions as to the guilt or inno-



cence of the defendant or as to procedural matters relating to the trial of the case in the requesting State. The Court has no reason to assume or believe that the State of Delaware in its judicial system will refuse to recognize and, thereby, thwart the constitutional guarantees that accrue to this or any other defendant. The guilt or innocence of the defendant of the charges preferred in the State of Delaware is not before the Court at this time.

The Court will discharge the writ which has issued in this case.

\* \* \*

---

Petitioner's Exhibit "A"  
[Filed Nov. 19, 1964]

The State of Delaware

vs

Roman Eugene Scarlett

September 4, 1963 — Bail Bond filed.

September 4, 1963 — Information filed.

September 4, 1963 — Motion to quash Information made by Counsel  
for the defendant, Roman Eugene Scarlett.

And now, to-wit: this 25th day of February, A.D. 1964, upon motion by the Assistant Deputy Attorney General, the Honorable William G. Bush, III, Judge, ordered a Nolle Prosequi entered.

Jacqueline O. Feldmann, Clerk

[Clerk's Seal]

---

[Filed 11/23/64]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the Court on a petition for a writ of habeas corpus and the writ having been issued; whereupon the Court having considered the petition, the return and answer thereto, and testimony and argument adduced in open court, the Court makes the following findings of fact:

1. Petitioner was arrested in the District of Columbia on September 3, 1964, on a charge of Fugitive from Justice, based on a warrant issued on August 1, 1964, in Kent County, Delaware, charging the petitioner with conspiracy to defraud the State of Delaware. On September 3, 1964, petitioner appeared before a Judge of the District of Columbia Court of General Sessions and the matter of his inter-state rendition was continued pending the receipt of the State papers.

2. On November 18, 1964, petitioner appeared before the Chief Judge of the United States District Court for the District of Columbia, sitting as the Chief Executive, on a hearing in the matter of inter-state rendition. After consideration of the papers filed by the Governor of the State of Delaware and argument of counsel, the Chief Executive found that the person sought in the Governor's papers was the petitioner; that petitioner was a fugitive from the State of Delaware; and that petitioner was substantially charged with a crime under the laws of that State. (Requisition #21-64)

3. A hearing on the writ was held on November 19, 1964, at which petitioner was represented by retained counsel who argued in his behalf.

4. The Governor's papers from the State of Delaware are in proper order.

5. The evidence showed that petitioner was the person named in the Governor's papers; that he was a fugitive from the State of Delaware; and petitioner was substantially charged with a crime under the laws of that State.

WHEREFORE, the Court concludes as a matter of law that:

1. The State of Delaware will give full recognition to the constitutional rights of the petitioner.
2. The only question before the Court is the identity of the demanded person; the jurisdiction of the requisitioning authority, showing that the demanded person is a fugitive from the Demanding State; and the substantiality of the offense charged; the Court is not at liberty to consider the question of the guilt or innocence of the petitioner; such an issue must be adjudicated in the Court of the Demanding State.
3. The respondent has shown that petitioner is the demanded person named in the Governor's paper; that he is in fact a fugitive from the State of Delaware; and that petitioner is substantially charged with a crime under the laws of that State.
4. Petitioner is legally ordered to be surrendered to the authorities of the Demanding State.
5. The petition should be dismissed.

E. A. TAMM  
Judge

---

[Filed 11/23/64]

ORDER

This matter having come before the Court on a petition for a writ of habeas corpus, the writ having been issued; whereupon the Court having considered the petition, the return and answer thereto, and evidence and argument adduced in open court, it is by the Court this 23rd day of Nov. , 1964,

ORDERED, That the writ be discharged, the petition dismissed and the petitioner remanded to the custody of the respondent.

E. A. TAMM  
Judge

[Certificate of Service  
dated 20 November 1964]



[Filed 12/2/64]

NOTICE OF APPEAL

Notice is hereby given this 2nd day of December , 1964, that plaintiff, Roman E. Scarlett hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 23rd day of November , 1964 in favor of defendant, Luke C. Moore, U.S. Marshal in and for District of Columbia against said plaintiff, Roman E. Scarlett, ordering petitioner's petition for writ of habeas corpus discharged and remanding petitioner to the custody of respondent.

CARR, BONNER, O'CONNELL, KAPLAN & SCOTT

By W. S. Bonner

Attorney for Plaintiff  
1001 Connecticut Avenue, N.W.  
Washington, D. C.

BRIEF FOR APPELLANT

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals  
for the District of Columbia Circuit

No. 19,117

FILED MAR 29 1965

*Nathan J. Paulson*  
CLERK

ROMAN E. SCARLETT,

*Appellant.*

v.

LUKE C. MOORE, UNITED STATES MARSHAL  
IN AND FOR THE DISTRICT OF COLUMBIA,

*Appellee.*

*Appeal From the United States District Court  
for the District of Columbia*

WALTER J. BONNER

1001 Connecticut Avenue, N.W.  
Washington, D. C. 20036

*Attorney for Appellant*

(i)

QUESTIONS PRESENTED

1. (a) Did not the District Court err in the habeas corpus hearing in failing to find that the moving papers of the demanding State failed to substantially charge the crime of conspiracy?

(b) No crime being substantially charged, did not the District Court err in failing to find that appellant was not, therefore, a fugitive?

2. Did not the District Court err in failing to find that appellant's constitutional rights were violated by the actions of the authorities of the demanding State?

3. Was not the hearing on the writ of habeas corpus defective, when, substantial issues being raised, the District Court failed to hear testimony from appellant and his witnesses, particularly when no testimony was offered by appellee?



(iii)

## INDEX

JURISDICTIONAL STATEMENT .....	1
STATEMENT OF THE CASE .....	2
STATUTES INVOLVED .....	7
STATEMENT OF POINTS .....	8
SUMMARY OF ARGUMENT .....	9
ARGUMENT:	
I. Since the Accusatory Affidavit Did Not State a Crime, Appellant Could Not Be a Fugitive and He Was Entitled To Be Released From Custody .....	10
II. Appellant's Total Treatment by Delaware Authorities Demonstrates Such a Course of Harassment as To Constitute a Denial of Constitutional Rights .....	13
III. Substantial Issues Being Raised, the District Court Was Obligated To Hear Testimony; the Court's Failure To Do So Constituted Error .....	16
CONCLUSION .....	17

## TABLE OF CASES

Beeler v. Crouse, 332 F.2d 703 (10 Cir. 1964) .....	10,13
Bruzaud v. Matthews, 93 U.S. App. D.C. 47, 207 F.2d 25 (1953) .....	10,13
Fowler v. Ross, 90 U.S. App. D.C. 305, 310, 196 F.2d 25 (1952) .....	10
In re Gibson, 147 F. Supp. 591 (D.C. D.C. 1957) .....	11
Johnson v. Dye, 175 F.2d 250 (3 Cir. 1949) .....	15
Johnson v. Matthews, 86 U.S. App. D.C. 376, 182 F.2d 677 (1950) .....	10, 12, 14
Miller v. Overholser, 92 U.S. App. D.C. 110, 206 F.2d 415 (1953) .....	12
Munsey v. Clough, 196 U.S. 364 (1905) .....	13
Richards v. Matthews, 93 U.S. App. D.C. 70, 207 F.2d 227 (1953) .....	11

(iv)

Stewart v. Overholser, 87 U.S. App. D.C. 402, 186 F.2d 339 (1950) .....	12, 16
United States v. Burke, 196 F.2d 785 (3 Cir. 1952), cert. denied, 343 U.S. 981 (1952) .....	13
Waley v. Johnston, 316 U.S. 101 (1942) .....	16
Walker v. Johnston, 312 U.S. 275 (1941) .....	16

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 19,117

---

ROMAN E. SCARLETT,

*Appellant,*

v.

LUKE C. MOORE, UNITED STATES MARSHAL  
IN AND FOR THE DISTRICT OF COLUMBIA,

*Appellee.*

---

*Appeal From the United States District Court  
for the District of Columbia*

---

## BRIEF FOR APPELLANT

### JURISDICTIONAL STATEMENT

Jurisdiction is conferred upon this Court by Title 28, Section 2253, of the United States Code.

This appeal is from the discharge of a writ of Habeas Corpus by the United States District Court for the District of Columbia on November 19, 1964, and from the findings of fact, conclusions of law, and order of that Court.



## STATEMENT OF THE CASE

### A. The Requisition Hearing

On November 18, 1964, appellant appeared before the Chief Judge of the United States District Court for the District of Columbia, in Requisition No. 21-64 (J.A. 7). The purpose of the hearing was to determine if appellant should be extradited to the State of Delaware on an alleged charge of conspiracy to defraud and cheat the State of Delaware by obtaining money under false pretenses (J.A. 7-8). During the course of the requisition hearing, counsel for appellant challenged the sufficiency of the accusatory affidavit of John Behen Maybee, Deputy Attorney General of Dover, Kent County, Delaware, upon which the allegation of crime was based (J.A. 10-11). Counsel also made known to the Court, in brief, some of the harassment by officials of the State of Delaware constituting a violation of appellant's constitutional rights (J.A. 13).

The Chief Judge of the District Court concluded that the moving papers of the State of Delaware were in proper order and that (J.A. 13):

"Cheating the State of Delaware is a crime in that State as it would be a crime here so I order him rendited."

Appellant's counsel, referring to D.C. Code, Title 23, Section 401, requested the Court to grant appellant a reasonable time in which to file a petition for writ of habeas corpus (J.A. 13). The following colloquy ensued (J.A. 13-14):

"Mr. Bonner: I understand that pursuant to the language of Title 23, Section 401, that we shall be granted a reasonable time in which to file a petition for writ of habeas corpus —

The Court: I am ordering him rendited. What you do is your business.

\* \* \*

The Court: I will not entertain a motion for a writ of habeas corpus.

Mr. Bonner: I do not ask you to.

The Court: What do you ask me to do?

Mr. Bonner: I ask that you, sitting as Governor, shall fix a reasonable time within which to allow us to file a petition for a writ of habeas corpus.

The Court: I will give you an hour to do it.

Mr. Bonner: Your Honor, will you allow us three hours?

The Court: One hour.

Mr. Bonner: Will your Honor give me until 4:00 o'clock?

The Court: One hour. Thank you very much."

#### **B. The Habeas Corpus Hearing**

Pursuant to the hour allowance granted by the Chief Judge, appellant filed his petition for writ of habeas corpus (J.A. 16-17). The petition requested relief on the ground that:

"2. . . the moving papers filed herein by the State of Delaware do not properly recite a crime under the laws of said State, upon which the extradition requested by said State may be granted under the facts and circumstances of this case.  
(J.A.

4. And for such other and further reasons as will be brought to the attention of the Court in the hearing of the petition."

The writ was issued (J.A. 19) and a "Return and Answer to Rule to Show Cause" was filed by counsel for appellee (J.A. 17). A hearing was held before a Judge of the District Court on November 19, 1964, Habeas Corpus No. 453-64 (J.A. 20). A technical deficiency in the service of process of the petition, raised by the Court (J.A. 20-21) was waived by counsel for appellee (J.A. 21) and explained by counsel for appellant (J.A. 22-23).

The hearing consisted solely of oral argument by counsel for appellant and appellee (J.A. 21, 29). During the course of oral argument, counsel for appellant informed the Court that the petition was based on a denial to appellant of his constitutional rights and on the failure of the moving papers to recite a crime (J.A. 23).

Regarding the denial of appellant's constitutional rights,<sup>1</sup> the Court was informed that on the morning of August 28, 1963, in the State of Delaware, appellant, a resident of the District of Columbia and a truck-driver of the Alfred H. Smith Asphalt Company, was arrested by Delaware authorities at approximately 4:00 a.m. (J.A. 24). Appellant was removed to a police barracks and continuously questioned by Delaware police and a Deputy Attorney General of that State, until approximately 1:00 p.m. (J.A. 24). During the entire period of questioning, appellant, who was suffering from a serious case of diabetes, and who required his medication between 6:00 a.m. and 7:00 a.m. that morning, did not receive the medication until noon (J.A. 24). In addition, appellant was not fed and did not use toilet facilities (J.A. 24). During the course of interrogation, appellant was informed by the Deputy Attorney General that they had no interest in appellant but that they would walk all over the top of him in order to get to the head of this organization [Alfred H. Smith of the Alfred H. Smith Asphalt Company] (J.A. 24). Appellant was not informed from the time he was arrested at 4:00 a.m. until the time he was released at 6:00 p.m., that he had ever committed any crime whatsoever, nor was he advised of any rights to which he was entitled (J.A. 25). When friends attempted to gain information regarding appellant's arrest, so that a lawyer could be obtained for him and bond set, they were told by a magistrate of the State of Delaware to get out of his office (J.A. 24-25).

---

<sup>1</sup> A small portion of the facts that follow were conceded by appellee. (J.A. 30).



Subsequently, in the month of September, 1963, an Information was filed against appellant in the Court of Common Pleas for Kent County, Delaware, charging that he (J.A. 12-13; 25):

"... did then and there unlawfully attempt to cheat and defraud the State of Delaware and the State Highway Department of the State by falsely and fraudulently representing... that various invoices... actually reflected the quantities of asphalt of Contract #2133... with the intent that the said Department and the State of Delaware should pay to (sic) Albert J. Smith, Jr., for a quantity of asphalt in excess of that actually delivered in violation... of the Delaware Code...."

The Information was defective and on motion of appellant's Delaware counsel, and with the agreement of the Attorney General of Delaware, was dismissed by a Delaware Court (J.A. 25; 34).

Sometime after dismissal of the Information, and prior to the issuance of the fugitive warrant based on the Delaware moving papers in Requisition No. 21-64, appellant was contacted by Delaware police officers and a member of the Delaware Attorney General's staff (J.A. 25). The officials were in Maryland and invited appellant, living in the District of Columbia, to join them in their Maryland motel (J.A. 25). Appellant did not want to go but was afraid that if he did not do so he would again be subjected to similar treatment experienced in August, 1963 (J.A. 25-26). A car was sent to pick him up and when he arrived at the motel room — no Maryland officials being present — appellant was questioned by the Delaware officials. (J.A. 25-26).

Thereafter, appellant was again charged with a crime by the State of Delaware (J.A. 26). In the accusatory affidavit of John Behen Maybee, Deputy Attorney General of Dover, Kent County, Delaware, one of petitioner's inquisitors, it is alleged that "on or about the 28th day of August, A.D. 1963... and at various and diverse other times during the spring and summer months of 1963...", appellant and some nine



other employees "and Alfred H. Smith" (the owner of the business) "did then and there unlawfully conspire, confederate and agree. . . to cheat and defraud the State of Delaware . . ." (J.A. 2; see also J.A. 5).

The Court was informed that the accusatory affidavit was defective in that, no conspiracy was properly set forth due to the fact that Mr. Alfred H. Smith was not in the State of Delaware on August 28, 1964, nor during the spring and summer months of 1963. (J.A. 26). The Court was further informed that in support of his allegations of mistreatment and violations of his constitutional rights, appellant was "ready to take the stand" (J.A. 27). To support the claim that the accusatory affidavit was defective in setting forth a conspiracy consisting of appellant, others, and Alfred H. Smith, appellant's counsel advised the Court that Mr. Smith was in the courtroom and was prepared to swear under oath to his non-presence in Delaware at the times the alleged conspiracy took place (J.A. 26). In addition, the Court was made aware that another witness was present who would "swear in corroboration" of such non-presence (J.A. 27). And counsel for appellant challenged the Delaware officials present to swear to the contrary. . . .

"And it is my opinion — and it can only be that at the moment — that out of the four or five Delaware officials who are here today, police officers and a Deputy Attorney General of that state<sup>2</sup> not one of them can take that stand and swear to God under oath that Mr. Smith was in that state."

Appellant's proffered testimony was ignored, and at the close of the argument by counsel for appellant, the Court simply heard argument by counsel for appellee (J.A. 29).

At the close of argument by counsel for appellee, the Court made its Oral Ruling, discharging the writ (J.A. 33). The Court, subsequently entered findings of facts and conclusions of law and entered an Order discharging the writ, dismissing the petition and remanding appellant to the custody of appellee (J.A. 35-36). This appeal followed (J.A. 37).

<sup>2</sup> John Behen Maybee (J.A. 20).

### STATUTES INVOLVED

Title 18, United States Code, Section 3182, reads:

"Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged."

District of Columbia Code (1961 Edition), Title 23, Section 401, reads in pertinent part:

"(a) In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the Chief Judge of the United States District Court for the District of Columbia shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the District, in the same manner and under the same regulations as the executive authorities of the several States are required to do by the provisions of sections 5278 and 5279, title 66, of the Revised Statutes of the United States, 'Extradition,' and all executive and judicial officers are required to obey the lawful precepts or other process issued for that purpose, and to aid and assist in such delivery.

\* \* \*

"(c) No person apprehended in accordance with the provisions of subsections (a) and (b) of this section shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken before the chief judge of the United States District Court for the District of Columbia who shall inform him of the demand made for his surrender, and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if such person or his counsel shall state that he or they desire to test the legality of his arrest, the judge shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the United States attorney for the District of Columbia, and to the said agent of the demanding State: **Provided, however,** That nothing contained in this subsection shall prevent such person from waiving his right to appear before the chief judge of the United States District Court for the District of Columbia and voluntarily returning in custody of a proper official to the jurisdiction of the State, Territory, or other possession of the United States which is demanding him."

#### STATEMENT OF POINTS

1. The moving papers failed to state a crime and the District Court erred in failing to order appellant released from custody.
2. Since no crime was stated, appellant could not be a fugitive, and the District Court erred in failing to order appellant released from custody.
3. Appellant's constitutional rights being violated by the treatment of his person by Delaware authorities following his arrest, the District Court erred in failing to order appellant released from custody.
4. The hearing on the writ was defective in that the Court heard only oral argument and did not hear testimony proffered by appellant



and his witnesses. The Court should be ordered to hold a hearing at which such testimony shall be heard.

#### SUMMARY OF ARGUMENT

The moving papers of the State of Delaware failed substantially to state a crime of conspiracy, in that they stated that appellant had conspired with Alfred H. Smith, who was not present in the State when the alleged offense took place. Mr. Smith appeared at the habeas corpus proceeding to swear to his non-presence. A corroborating witness also appeared. The Court heard neither. The demanding State offered no testimony to prove presence. If either appellant or Mr. Smith did not conspire together on the date and place alleged no crime of conspiracy existed. Since Mr. Smith was not present, the offense was not properly charged in the moving papers. No crime being substantially charged, appellant could not be a fugitive.

Appellant was arrested at 4:00 a.m., questioned until 1:00 p.m., and released at 6:00 p.m. He was never informed of any charge against him, was not given medication for diabetes when needed, nor was he fed or did he use toilet facilities. Appellant was not advised of any of his rights. He was informed by a Deputy Attorney General of Delaware that the authorities would walk all over the top of him to get to his employer, Mr. Alfred H. Smith. This conduct by Delaware authorities, in addition to their subsequent harassment of appellant, constituted a violation of his constitutional rights.

Appellant, and Mr. Alfred H. Smith and a corroborating witness were prepared to offer sworn testimony at the habeas corpus hearing in support of the substantial issues raised. The appellee offered no countering testimony. The Court was obliged to hear appellant and his witnesses. The Court's failure to do so prevented appellant from obtaining the type of hearing to which he was entitled.



ARGUMENT

## I

**Since the Accusatory Affidavit Did Not State a Crime,  
Appellant Could Not Be a Fugitive and He was Entitled  
to be Released from Custody**

It was held by this Court in *Johnson v. Matthews*, 86 U.S. App. D.C. 376, 378, 182 F.2d 677 (1950), that in a habeas corpus proceeding involving extradition the subjects of inquiry are: (1) whether a crime has been substantially charged in the demanding state; (2) whether the prisoner is the person charged; and (3) whether the prisoner was in the demanding state at the time of the crime. Therefore, assuming that a prisoner is the person charged, he is still entitled to be released if the moving papers of the demanding state fail substantially to state a crime or if he was not present in that state at the time of the alleged offense. Of course, it also follows that if no crime is charged, i.e., properly set forth in the moving papers, the prisoner cannot be a fugitive, for to be a fugitive he must be "in the demanding state when the crime was charged to have been committed." (Emphasis supplied.) *Fowler v. Ross*, 90 U.S. App. D.C. 305, 310, 196 F.2d 25 (1952). Fugitivity is a question of fact. *Bruzaud v. Matthews*, 93 U.S. App. D.C. 47, 48, 207 F.2d 25 (1953). Since habeas corpus is a civil proceeding, the burden of proof upon a petitioner is to show by a preponderance of the evidence that he is entitled to relief. *Beeler v. Crouse*, 332 F.2d 703, (10 Cir. 1964). Here, appellant met that burden and should have been released from custody.

The accusatory affidavit of John Behen Maybee, Deputy Attorney General of Dover, Kent County, Delaware, was challenged at both the requisition and habeas corpus proceedings (J.A. 10;26). The basis of the challenge was that the affidavit, in attempting to set forth an offense of **conspiracy** under the laws of the State of Delaware, read in pertinent part as follows (J.A. 2):

"... that on or about the 28th day of August A.D. 1963 . . . and diverse other times during the spring and summer months of 1963 . . . [appellant *and* some nine other men] *and* Alfred H. Smith [unlawfully conspired, confederated and agreed] to cheat and defraud the State of Delaware. . . ."  
(Emphasis supplied)

The only specific date contained in the accusatory affidavit is August 28, 1963. It is, therefore, the only date which had to be challenged by appellant in producing evidence of a crime not being substantially charged and/or of non-presence in the demanding state. The allegation of "at various and diverse other times in the spring and summer months of 1963" is too vague. *In re Gibson*, 147 F.Supp. 591, 593 (D.C. D.C. 1957). *Cf. Richards v. Matthews*, 93 U.S. App. D.C. 70, 72-73, 207 F.2d 227 (1953).

For the most part, crimes charged in moving papers of a demanding state are of a nature that they are capable of being committed solely by the person demanded. The questions of a crime being substantially charged and fugitivity, ordinarily revolve around the person of the accused. In the instant case, however, the contrary is true. By its very nature conspiracy calls for the concert of two or more persons. The accusatory affidavit herein describes the conspiracy as a concert of action among appellant *and* nine others *and* Alfred H. Smith. On the day of the habeas corpus hearing, Alfred H. Smith was present in the courtroom (J.A. 26). He was prepared to take the stand and swear under oath in contradiction of Delaware's moving papers (J.A. 26-27). A corroborating witness was also present (J.A. 27). The Court did not hear the witnesses. Counsel for appellee never proffered a witness in opposition (J.A. 29-33), although challenged by counsel for appellant to do so (J.A. 27):

"And it is my opinion — and it can only be that at the moment — that out of the four or five Delaware officials who are here today, police officers and a Deputy Attorney General <sup>3</sup>

<sup>3</sup> John Behen Maybee (J.A. 20).

of that state, not one of them can take the stand and swear to God under oath that Mr. Smith was in that state."

To extradite appellant it is essential that a crime be substantially charged. *Johnson v. Matthews, supra*. The crime alleged is a conspiracy. Conspiracy consists of certain essential elements. The accusatory affidavit upon which the demand is made must contain the elements of that offense, in order that a crime be substantially charged. One of the most important elements is the naming of the conspirators. The accusatory affidavit insists that the conspiracy in this case is composed of appellant and nine others and Alfred H. Smith. For the conspiracy in the moving papers to exist, Mr. Smith had to be present on August 28, 1963. The crime of conspiracy as contained therein could not exist without that presence. In effect, if Mr. Smith was not present as alleged on the date in question, the conspiracy charged could no more have taken place than if appellant had been accused of larceny on that same date but was not present as alleged. Under these circumstances, appellant can no more be a fugitive from the conspiracy charged than he could be from the larceny. To require more of appellant, where the crime charged is a conspiracy, is to ignore this Court's prior directives that the writ of habeas corpus must not be "circumscribed by any technical considerations" and that the proceeding is one "in which a liberal judicial attitude is peculiarly appropriate." *Miller v. Overholser*, 92 U.S. App. D.C. 110, 116, 206 F.2d 415 (1953); *Stewart v. Overholser*, 87 U.S. App. 402, 405, 186 F.2d 339 (1950).

Naturally, in the imaginary case of larceny, the demanding state could present evidence to overcome appellant's evidence that he was not in the demanding state on the date alleged. So too, here. When appellant offered witnesses to prove the non-presence of Alfred H. Smith, that testimony was required to be heard.<sup>4</sup> Appellee should then have been required to refute the same. If the evidence was conflicting, the Court

<sup>4</sup> The failure of the Court to hear this testimony is discussed *infra*, argument III.



would not have been bound to discharge appellant. *Bruzaud v. Matthews, supra*, at page 49-50 U.S. App. D.C., citing *Munsey v. Clough*, 196 U.S. 364 (1905). However, the record discloses only appellant's offer of testimony and silence on the part of appellee, (J.A. 26-27; 29-33). This status of the proceeding placed appellant in the position of having established his entitlement to relief by a preponderance of the evidence. Such being the case, appellant was entitled to be released from custody. *Beeler v. Crouse, supra*.

## II

### Appellant's Total Treatment by Delaware Authorities Demonstrates Such a Course of Harassment as To Constitute a Denial of Constitutional Rights

It has been established "that a writ of habeas corpus searches the record back of the commitment . . . [and] . . . places 'a duty on the court to explore the foundations, and pronounce them true or false'." *United States v. Burke*, 196 F.2d 785, 788 (3 Cir. 1952), *cert. denied*, 343 U.S. 981 (1952).

During the habeas corpus proceeding the Court was informed that appellant was ready to take the stand and swear to the allegations of mistreatment and violations of his rights outlined by his counsel during oral argument (J.A. 27). The Court did not see fit to hear appellant. However, the Court was informed by counsel for appellant that appellant was arrested at 4:00 a.m. on August 28, 1963; continuously questioned until 1:00 p.m.; deprived of medication for diabetes when needed, and of toilet facilities, and of food; incarcerated until 6:00 p.m.; never informed of any of his rights or even the offense with which he was allegedly charged; informed by the Deputy Attorney General of Delaware that they had no interest in appellant but would walk all over the top of him in order to get to Mr. Alfred H. Smith; that when friends of appellant attempted to gain information regarding his arrest so that legal counsel could be



obtained and bail set, they were informed by a Delaware magistrate to get out of his office (J.A. 24).

The Court was also informed that in September 1963 an Information was brought against appellant but was subsequently dismissed by a Delaware Court as defective (J.A. 25; 34; 12-13). In addition, the Court was made aware that appellant was subsequently "invited" to a Maryland motel by Delaware police officers and a member of the Delaware Attorney General's office (J.A. 25). Appellant went out of fear and was again questioned (J.A. 25). Finally, appellant was again charged with cheating the State of Delaware, only this time, by conspiracy (J.A. 26; 5).

The totality of appellant's treatment as set forth above, consists of a scheme of harassment on the part of Delaware authorities which constituted a denial of appellant's constitutional rights. The fact is evident that appellant, a truckdriver (J.A. 24; 2), was and is being used by the State of Delaware to make a case against his employer, Alfred H. Smith, the owner and president of the Alfred H. Smith Asphalt Company (J.A. 8; 26). Delaware's attitude is summed up in the words of its Deputy Attorney General that while the state had no interest in appellant they would walk all over the top of him in order to get to Mr. Smith (J.A. 24).

Although orderly extradition procedures may be important to the workings of the sovereign states within our federal system, it is, nevertheless more important that an individual's fundamental rights be even more jealously guarded. As stated by the Chief Judge of this Court in his dissent in *Johnson v. Matthews, supra*, at page 384:

"The obvious importance of the federal system, and the desire to facilitate its workings, should not obscure the fact that action in pursuance of one constitutional power may run afoul of another. Unless the Constitution is read as a whole, there is grave danger that the extradition process will be executed in unduly mechanistic fashion and in complete disregard of the fundamental considerations of humanity and decency which are reflected in the Bill of Rights. Certainly,

the interest of the various governments of our federal system in the orderly workings of the extradition machinery is a factor of moment. And in such interest, it may ordinarily be desirable to limit the inquiry on habeas corpus to the three or four traditional questions posed in such cases. But where one constitutional purpose must be weighed against another — one promoting efficiency and comity between the states, the other protecting fundamental rights of the individual against state infringement — our system of government will be better served by assessing greater weight to the latter."

This reasoning of the dissent is indeed applicable to the instant case. A failure to recognize the rights of appellant as paramount to those of the State, under the circumstances of this case, provides incentive to police officials to carry out their tasks as best suits their purpose, regardless of a citizen's rights.

In the case of *Johnson v. Dye*, 175 F.2d 250 (3 Cir. 1949), the petitioner was a convicted murderer, and a fugitive from the State of Georgia, complaining, among other things, of cruel and harsh treatment by his jailors. The Court, in ordering release of the convict, stated in pertinent part (page 256 F.2d):

"The obligations of a State to treat its convicts with decency and humanity is an absolute one and a federal court will not overlook a breach of that duty.

\* \* \*

"It follows, therefore, that Johnson must be set at liberty for the State of Georgia has failed signally in its duty as one of the sovereign States of the United States to treat a convict with decency and humanity."

Appellant is not a convicted murderer but only a truckdriver accused of a conspiratorial offense. The protection afforded him from abuse by the authorities of a sovereign State cannot be less than the protection afforded a convicted murderer. The course of conduct engaged in by the Delaware authorities requires that appellant be released from custody.

## III

**Substantial Issues Being Raised, the District Court Was Obligated To Hear Testimony; the Court's Failure To Do So Constituted Error**

---

Following the filing of appellant's petition for writ of habeas corpus, the writ was issued and a hearing held. As has been shown, substantial issues of fact were raised by appellant at that hearing. The Court, however, heard only oral arguments of counsel (J.A. 21; 33). The Court did not hear testimony of appellant and his witnesses, although aware that such testimony was readily available (J.A. 23; 26-27).

The Supreme Court has held that once the writ has issued the Court, ". . . shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." (Emphasis supplied.) *Walker v. Johnson*, 312 U.S. 275, 284 (1941)<sup>5</sup>. This Court has insisted on the same procedure. *Stewart v. Overholser*, *supra*, at page 405, U.S. App. D.C.

Thus, appellant was placed in the position of offering testimony in support of his specific substantial allegations, and appellee in the position of neither offering nor being required to offer countering testimony. This was error. The Supreme Court, in *Waley v. Johnston*, 316 U.S. 101, 104 (1942), ruled that the hearing of testimony by the Court under such circumstances is required even where, contrary to the instant case, the allegations are almost beyond belief:

"True, petitioner's allegations in the circumstances of this case may tax credulity. But in view of their specific nature, . . . and the failure of respondent to deny or account for his failure to deny them specifically we cannot say that the issue was not one calling for a hearing within the principles laid down in *Walker v. Johnston*, *supra*."

<sup>5</sup> The Court went on to emphasize that (p. 286) "such a judicial inquiry involves the reception of testimony . . ." (Emphasis supplied.)



Appellant is entitled to a hearing at which his testimony and the testimony of his witnesses may be heard for the reason that proof of such facts would entitle appellant to be released from custody.

CONCLUSION

WHEREFORE, appellant respectfully submits that the ruling of the District Court discharging the writ of habeas corpus should be reversed and appellant ordered released from custody, or, in the alternative, that the District Court should be ordered to hold a hearing at which appellant may present testimony.

Respectfully submitted,

Walter J. Bonner  
1001 Connecticut Avenue, N.W.  
Washington, D. C. 20036  
*Attorney for Appellant*



BRIEF FOR APPELLEE

---

**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 19117

---

ROMAN E. SCARLETT, APPELLANT

v.

LUKE C. MOORE, United States Marshal for the District  
of Columbia, APPELLEE

---

Appeal from the United States District Court  
for the District of Columbia

---

United States Court of Appeals  
for the District of Columbia Circuit

FILED MAR 31 1965

DAVID C. ACHESON,  
*United States Attorney.*

FRANK Q. NEBEKER,

JOHN A. TERRY,

*Assistant United States Attorneys.*

*Nathan J. Paulson*  
CLERK

(H.C. No. 453-64)

---

## QUESTIONS PRESENTED

The Chief Judge of the District Court, sitting in his executive capacity, received a requisition from the Governor of Delaware for the rendition of appellant to that State. The Governor's requisition, together with its accompanying papers, charged appellant with the crime of conspiracy to defraud the State of Delaware in violation of a Delaware statute. Ten co-conspirators were named in the Governor's papers. Appellant conceded the factual issues of identity and fugitivity. He contended, however, that he was not substantially charged with a crime, in that one of the ten co-conspirators was not present in the State of Delaware on the date of the alleged offense. He further contended that he should not be returned to the custody of Delaware officials because on a prior occasion, when arrested by Delaware police, he had been mistreated to the extent that his constitutional rights were violated. The decision of the Chief Judge ordering appellant's rendition to Delaware was upheld upon review by the District Court in a habeas corpus proceeding. On appeal from the District Court's dismissal of the habeas corpus petition and discharge of the writ, the following questions are presented:

1. Was appellant substantially charged with a crime?
2. If so, was he nevertheless entitled to release from custody because of the alleged past violations of his constitutional rights by Delaware officials?
3. Did the District Court err in failing to take testimony on either of these two issues at the habeas corpus hearing, deciding the case after argument by counsel?

# INDEX

	Page
Counterstatement of the Case .....	1
Statutes Involved .....	3
Summary of Argument .....	5
Argument:	
1. Appellant was substantially charged with a crime in the State of Delaware .....	6
2. Appellant's other contentions are without merit .....	9
Conclusion .....	11

## TABLE OF CASES

<i>Berry v. State</i> , 202 Ind. 294, 173 N.E. 705 (1930).....	7
* <i>Bruzaud v. Matthews</i> , 93 U.S. App. D.C. 47, 207 F.2d 25 (1953) .....	7, 9
<i>Curtis v. State</i> , 102 Ga. App. 790, 118 S.E.2d 264 (1960) .....	8
<i>Dye v. Johnson</i> , 338 U.S. 864 (1949) .....	10
<i>English v. Matowitz</i> , 148 Ohio St. 39, 72 N.E.2d 898 (1947) ..	8
* <i>Ex parte Birdseye</i> , 244 Fed. 972 (S.D.N.Y. 1917), <i>aff'd sub</i> <i>nom. Birdseye v. Woods</i> , 246 U.S. 657 (1918) .....	9
* <i>Ex parte Montgomery</i> , 244 Fed. 967 (S.D.N.Y. 1917), <i>aff'd</i> <i>sub nom. Montgomery v. Woods</i> , 246 U.S. 656 (1918) .....	8, 9
<i>Ex parte Morgan</i> , 78 F. Supp. 756 (S.D. Cal. 1948), <i>aff'd</i> <i>sub nom. Morgan v. Horrall</i> , 175 F.2d 404 (9th Cir.), <i>cert. denied</i> , 338 U.S. 827 (1949) .....	8
* <i>Ex parte Morgan</i> , 86 Cal. App. 2d 217, 194 P.2d 800 (1948) ..	8
* <i>Farnsworth v. Zerbst</i> , 98 F.2d 541 (5th Cir. 1938), <i>cert.</i> <i>denied</i> , 307 U.S. 642 (1939) .....	7
<i>Fowler v. Ross</i> , 90 U.S. App. D.C. 305, 196 F.2d 25 (1952) ..	7
<i>Hyatt v. New York ex rel. Corkran</i> , 188 U.S. 691 (1903) .....	7
<i>Hyde v. United States</i> , 225 U.S. 347 (1912) .....	8
<i>Johnson v. Dye</i> , 175 F.2d 250 (3d Cir.), <i>rev'd</i> , 338 U.S. 864 (1949) .....	10
* <i>Johnson v. Matthews</i> , 86 U.S. App. D.C. 376, 182 F.2d 677, <i>cert. denied</i> , 340 U.S. 828 (1950) .....	9, 10
* <i>Moncrief v. Anderson</i> , Misc. No. 2409, decided November 10, 1964 .....	6, 7
<i>Munsey v. Clough</i> , 196 U.S. 364 (1905) .....	6
<i>State v. Hartnett</i> , 23 Del. (7 Penne.) 204, 74 Atl. 82 (Ct. Gen. Sess. 1909) .....	5
<i>State v. Lynn</i> , 19 Del. (3 Penne.) 316, 51 Atl. 878 (Ct. Gen. Sess. 1901) .....	5
<i>State v. White</i> , 20 Del. (4 Penne.) 6, 54 Atl. 956 (Ct. Gen. Sess. 1902) .....	5



## II

Cases—Continued	Page
* <i>Strassheim v. Daily</i> , 221 U.S. 280 (1911) .....	8, 9
* <i>Sweeney v. Woodall</i> , 344 U.S. 86 (1952) .....	9, 10, 11
<i>United States v. Brandt</i> , 139 F. Supp. 367 (N.D. Ohio 1955), rev'd on other grounds, 256 F.2d 79 (6th Cir. 1958) .....	8
* <i>Walker v. Johnston</i> , 312 U.S. 275 (1941) .....	10

### OTHER REFERENCES

Act of June 25, 1948, ch. 645, § 21, 62 Stat. 862 .....	4
23 D.C. Code § 403 .....	1
11 DEL. CODE ANN. § 3107 .....	5
28 U.S.C. § 2243 .....	10

---

\* Cases chiefly relied upon are marked by asterisks.

# **United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

No. 19117

---

ROMAN E. SCARLETT, APPELLANT

*v.*

LUKE C. MOORE, United States Marshal for the District  
of Columbia, APPELLEE

---

Appeal from the United States District Court  
for the District of Columbia

---

BRIEF FOR APPELLEE

---

## **COUNTERSTATEMENT OF THE CASE**

Complaints and warrants were issued in Kent County, Delaware, on August 1, 1964, charging Roman E. Scarlett and ten others<sup>1</sup> with conspiracy to defraud the State of Delaware in violation of 11 DEL. CODE ANN. § 105. Scarlett was subsequently arrested in the District of Columbia on a fugitive warrant<sup>2</sup> based on the Delaware

---

<sup>1</sup> Nine of the co-conspirators were identified as employees of the tenth, Alfred H. Smith, who is also Scarlett's employer. See J.A. 2, 5.

<sup>2</sup> 23 D.C. Code § 403.

charge. Pursuant to 23 D.C. Code § 401 (c), Scarlett appeared before the Chief Judge of the District Court, with counsel, on November 18, 1964. A requisition from the Governor of Delaware was presented to the Chief Judge, together with accompanying papers, asking that Scarlett be turned over to the custody of certain named officers for return to the State of Delaware. After a hearing the Chief Judge ordered Scarlett surrendered to the officers from Delaware to be taken back to that State to answer the charge of conspiracy (J.A. 15).

Scarlett promptly filed a petition for a writ of habeas corpus, naming as respondent the United States Marshal for the District of Columbia, in whose custody he still remained. The writ was issued, and the respondent filed a return and answer to the writ.<sup>3</sup> A hearing was held the following morning, November 19, 1964, before Judge Tamm of the District Court. Both in his petition (J.A. 16) and in oral argument at the hearing (J.A. 26-27) Scarlett's principal contention was that the Governor's papers from the State of Delaware did not charge him with a crime under the laws of that State. The basis of his contention was an allegation that one of the co-conspirators charged with him, Alfred H. Smith, was not physically present in the State of Delaware on August 28, 1963, the date of the offense as stated in the Governor's papers.<sup>4</sup> After hearing argument from counsel for both parties the court discharged the writ, dismissed

---

<sup>3</sup> The return was inadvertently captioned "Return and Answer to Rule to Show Cause." No rule to show cause had been issued. See J.A. 20.

<sup>4</sup> A secondary argument was made below (and is made in this Court; see Brief for Appellant, 13-15) that certain alleged violations of appellant's constitutional rights by Delaware authorities in August 1963 required that he be released from custody and not returned to that State. Appellant had been arrested on August 28, 1963, and charged with attempting to defraud the State of Delaware. He was released later the same day, and the charges were subsequently dropped (J.A. 3, 25, 30, 34). Further investigation led to the initiation of prosecution against appellant and ten others in August 1964, almost a year later, for conspiracy to defraud the State (J.A. 3, 30).



the petition, and remanded the petitioner to the custody of the respondent (J.A. 36). This appeal followed.

### STATUTES INVOLVED

Title 18, § 3182, United States Code, provides:

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

Title 23, § 401, District of Columbia Code, provides in pertinent part:

(a) In all cases where the laws of the United States provide that fugitives from justice shall be delivered up, the Chief Judge of the United States District Court for the District of Columbia shall cause to be apprehended and delivered up such fugitive from justice who shall be found within the District, in the same manner and under the same regulations as the executive authorities of the several States are required to do by the provisions of sections 5278 and 5279, title 66, of the Revised Statutes of the United States,<sup>3</sup> "Extradition", and all execu-

<sup>3</sup> Sections 5278 and 5279 of the Revised Statutes were repealed when the federal criminal code was enacted into positive law. Act

tive and judicial officers are required to obey the lawful precepts or other process issued for that purpose, and to aid and assist in such delivery.

\* \* \* \*

(c) No person apprehended in accordance with the provisions of subsections (a) and (b) of this section shall be delivered over to the agent whom the executive authority demanding him shall have appointed to receive him unless he shall first be taken before the chief judge of the United States District Court for the District of Columbia who shall inform him of the demand made for his surrender, and of the crime with which he is charged, and that he has the right to demand and procure legal counsel; and if such person or his counsel shall state that he or they desire to test the legality of his arrest, the judge shall fix a reasonable time to be allowed him within which to apply for a writ of habeas corpus. When such writ is applied for, notice thereof, and of the time and place of hearing thereon, shall be given to the United States attorney for the District of Columbia, and to the said agent of the demanding State: *Provided, however,* That nothing contained in this subsection shall prevent such person from waiving his right to appear before the chief judge of the United States District Court for the District of Columbia and voluntarily returning in custody of a proper official to the jurisdiction of the State, Territory, or other possession of the United States which is demanding him.

Title 11, § 105, Delaware Code Annotated, provides:

Whoever commits or is guilty of an assault, battery, cheat, conspiracy, nuisance or any other offense indictable at common law for which punishment is not specifically prescribed by statute shall be fined in such amount, or imprisoned for such term, or both, as the court, in its discretion, may determine.

of June 25, 1948, ch. 645, § 21, 62 Stat. 862. Pertinent statutory language equivalent to what was contained in those sections may now be found in 18 U.S.C. § 3182, *supra*.

Title 11, § 554, Delaware Code Annotated, provides in pertinent part:

Whoever, by any false pretense, obtains from any other person any chattel, money or thing the subject of larceny, or any valuable thing, or any right or privilege, with intent to cheat or defraud any person <sup>o</sup> of the same, shall be fined or imprisoned, or both, as the court deems proper under the circumstances . . . .

### SUMMARY OF ARGUMENT

Before a requisition for interstate rendition can be honored by the executive authority of the asylum state or district, it must be established that the person demanded is substantially charged with a crime in the demanding state and that he is a fugitive. Appellant does not dispute his fugitivity; he concedes it and concedes further the issue of identity. He contends here, as below, only that he has not been substantially charged with a crime in the State of Delaware, in that Smith, one of his co-conspirators, was absent from that State on the date of the conspiracy as alleged in the Governor's papers. But whether a prisoner is substantially charged with a crime is a question of law, not of fact, and can be determined from the requisition papers themselves. Even assuming the truth of appellant's allegation, Smith's absence from the State of Delaware could at best benefit Smith alone; if he were thereby immunized from prosecution in Delaware, it does not follow that appellant would *ipso facto* acquire the same immunity. Moreover, as a matter of law Delaware can prosecute Smith for conspiracy regardless of his actual presence or non-presence in the State if it can manage to acquire jurisdiction of his person. Con-

---

<sup>o</sup> The State is a "person" within the meaning of the statute. See *State v. Hartnett*, 23 Del. (7 Penne.) 204, 74 Atl. 82 (Ct. Gen. Sess. 1909); *State v. White*, 20 Del. (4 Penne.) 6, 54 Atl. 956 (Ct. Gen. Sess. 1902); *State v. Lynn*, 19 Del. (3 Penne.) 316, 51 Atl. 878 (Ct. Gen. Sess. 1901); cf. 11 DEL. CODE ANN. § 3107.



structive presence is sufficient to sustain a charge or even a conviction of conspiracy. In any event, whether Smith was or was not in Delaware on August 28, 1963, is irrelevant to the legal issue of whether or not this appellant is substantially charged with a crime. The District Court did not err in failing to take testimony as to Smith's absence, for to have done so would have served no valid legal purpose and would not have aided the court in resolving any issue properly before it.

Nor is error to be found either in the court's rejection of appellant's allegations that his constitutional rights had been violated by Delaware authorities in August 1963 or in the court's failure to hear testimony in support of those allegations. Even assuming them to be true, they cannot prevent appellant's return to Delaware now pursuant to the order of the Chief Judge. Such contentions cannot be made in the courts of an asylum state by an individual seeking to prevent his return to the state where he committed a crime upon the requisition of its Governor. The proper forum for such assertions is in the demanding state, in this case Delaware. It is improper and does violence to the fundamental nature of our federal system to assume, or even to suggest, that the Delaware courts would be any less conscientious and unbiased in protecting the constitutional rights of any accused than the courts of the District of Columbia.

### ARGUMENT

#### 1. Appellant was substantially charged with a crime in the State of Delaware

"Interstate extradition, under the Constitution and implementing statutes, is conditioned upon two requirements. The person demanded must be 'substantially charged with a crime' and he must be a 'fugitive.' . . . The first element, a valid charge of the commission of a crime, is one of law, and can be determined from the extradition papers." *Moncrief v. Anderson*, Misc. No. 2409, decided November 10, 1964, slip opinion at 3 and n.3 (citations and other footnotes omitted); see *Munsey v. Clough*, 196

U.S. 364 (1905); *Hyatt v. New York ex rel. Corkran*, 188 U.S. 691 (1903); *Bruzaud v. Matthews*, 93 U.S. App. D.C. 47, 207 F.2d 25 (1953). Appellant's fugitivity is undisputed.<sup>7</sup> His primary contention here is that he was not substantially charged with a crime in the State of Delaware, in that Alfred H. Smith, one of his ten alleged co-conspirators, was not present in that State on the date of the offense.<sup>8</sup> This contention is without support in law. There is no legal connection between Mr. Smith's presence in or absence from the State of Delaware and the validity of the charge against appellant as set forth in the Governor's papers.

Those papers charge appellant, Roman E. Scarlett, with having entered into a conspiracy with ten other individuals to defraud the State of Delaware by obtaining money by false pretenses from the Delaware State Highway Department. Neither Mr. Smith nor any of the other nine co-conspirators stands charged in those papers. It is only the charges against appellant which are of concern here. Assuming *arguendo* that Smith's alleged absence from the State of Delaware would enable Smith to avoid prosecution, it does not follow that appellant can avoid it along with him. A defendant can be prosecuted for and convicted of conspiracy although all of his co-conspirators may be immune from prosecution either for conspiracy or for the substantive offense. *Farnsworth v. Zerbst*, 98 F.2d 541 (5th Cir. 1938), *cert. denied*, 307 U.S. 642 (1939); *Berry v. State*, 202 Ind. 294, 173 N.E. 705 (1930).

<sup>7</sup> Fugitivity—i.e., whether the accused was present in the demanding state when the crime was committed—is a question of fact. *Moncrief v. Anderson*, *supra*, and cases cited therein. Appellant has acknowledged that he was in Delaware on August 28, 1963, the date of the offense as charged in the Governor's papers (J.A. 9); indeed, he was arrested there on that date (J.A. 3, 24; Brief for Appellant, 4, 13).

<sup>8</sup> A third issue, that of identity—i.e., whether the person in custody is the person charged in the Governor's papers, *Fowler v. Ross*, 90 U.S. App. D.C. 305, 310, 196 F.2d 25, 30 (1952)—is also uncontested. See J.A. 8, 35.

In any event, the fact that Smith may not have been in Delaware at the time of the offense does not bar prosecution of Smith for conspiracy. "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect, if the state should succeed in getting him within its power." *Strassheim v. Daily*, 221 U.S. 280, 285 (1911). An argument similar to that advanced here by appellant was given short shrift in the Southern District of New York, with the subsequent approval of the Supreme Court:

It is not necessary that the relator should have been at the place where the crime is alleged to have been committed to be legally charged with the crime of conspiracy. He may be guilty without having either engaged in the conspiracy or done anything in pursuance of it while physically in the state of Pennsylvania. There are various crimes, including conspiracy, where a person may do something in one state which would result in a crime committed in another state. *Ex parte Montgomery*, 244 Fed. 967, 969 (S.D.N.Y. 1917), *aff'd sub nom. Montgomery v. Woods*, 246 U.S. 656 (1918).

Presence at the scene, or even in the state, is not prerequisite to either a charge or a conviction of conspiracy. Constructive presence is sufficient. *Ex parte Morgan*, 86 Cal. App. 2d 217, 194 P.2d 800 (1948);<sup>\*</sup> *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960); *English v. Matowitz*, 148 Ohio St. 39, 72 N.E.2d 898 (1947); see *Hyde v. United States*, 225 U.S. 347 (1912); *United States v. Brandt*, 139 F. Supp. 367, 369 (N.D. Ohio 1955), *rev'd on other grounds*, 256 F.2d 79 (6th Cir. 1958).

While Smith's absence from the State of Delaware would be relevant to the factual issue of fugitivity if

<sup>\*</sup> See also *Ex parte Morgan*, 78 F. Supp. 756 (S.D. Cal. 1948), *aff'd sub nom. Morgan v. Horrall*, 175 F.2d 404 (9th Cir.), *cert. denied*, 338 U.S. 827 (1949).



Smith were sought to be extradited, as *Ex parte Montgomery, supra*, demonstrates, it is of no significance whatever in determining the legal issue of whether there has been a valid charge of commission of a crime. Moreover, it is a question which may be raised only by Smith if and when the Governor of Delaware requests Smith's return to that State. It is not relevant to any of the issues before the Chief Judge of the District Court, the habeas corpus judge below, or this Court in this case. It is an issue which this appellant cannot raise at any stage of the proceedings, either here or in Delaware. Appellant was substantially charged with the crime of conspiracy in violation of a specific Delaware statute. The Chief Judge and the court below correctly ruled, on the basis of the Governor's papers, that he was so charged as a matter of law. Appellant having conceded the factual issues of identity and fugitivity, the court reached the limit of permissible inquiry in the District of Columbia. *Strassheim v. Daily, supra*; *Bruzaud v. Matthews, supra*; *Ex parte Birdseye*, 244 Fed. 972 (S.D.N.Y. 1917), *aff'd sub nom. Birdseye v. Woods*, 246 U.S. 657 (1918).

## 2. Appellant's other contentions are without merit

Two other points raised by appellant may be treated summarily.

First, appellant contends that certain alleged violations of his constitutional rights by Delaware law enforcement authorities at the time of his arrest in August 1963 necessitate his release from custody now, more than a year and a half later. Such is not the law. Assuming without conceding (see J.A. 30) the truth of his allegations, appellee submits that appellant may test the claimed unconstitutionality of his treatment by Delaware officials only in the courts of that State, "where all parties may be heard, where all pertinent testimony will be readily available and where suitable relief, if any is necessary, may be fashioned." *Sweeney v. Woodall*, 344 U.S. 86, 90 (1952); *accord, Johnson v. Matthews*, 86 U.S. App. D.C. 376, 182

F.2d 677, *cert. denied*, 340 U.S. 828 (1950).<sup>10</sup> There is no reason to believe, as the court below correctly observed (J.A. 34, 36), that the Delaware courts will fail or refuse to remedy any violation of appellant's constitutional rights if he makes an appropriate showing that they have been infringed. Any suggestion to the contrary should be emphatically rejected out of hand.

*Second*, appellant contends that the District Court erred in failing to hear testimony on the "substantial issues of fact"<sup>11</sup> which he raised below. But the material facts are undisputed. Appellant has conceded the issues of identity and fugitivity; "the application for the writ and the return present only issues of law . . . ." 28 U.S.C. § 2243. The very case upon which appellant relies manifestly authorizes the procedure which the District Court followed.<sup>12</sup> As we have seen (Argument 1, *supra*), the fact that appellant's alleged co-conspirator may not have

<sup>10</sup> The case of *Johnson v. Dye*, 175 F.2d 250 (3d Cir. 1949), upon which much of appellant's argument depends, was summarily reversed by the Supreme Court. *Dye v. Johnson*, 338 U.S. 864 (1949). The Court's later opinion in *Sweeney v. Woodall*, *supra*, makes it clear that the interpretation placed upon *Dye v. Johnson* by the majority in *Johnson v. Matthews*, *supra* at 381-382 n.21, 182 F.2d at 682-683 n.21, is correct and should be relied upon in preference to the view of the dissenting judge in the same case, *id.* at 384-385 n.1, 182 F.2d at 685-686 n.1. Moreover, the majority in *Johnson v. Matthews*, *supra* at 383, 182 F.2d at 684, expressly rejected the opinion of the Third Circuit in *Johnson v. Dye*.

<sup>11</sup> Brief for Appellant, 16.

<sup>12</sup> *Walker v. Johnston*, 312 U.S. 275, 284 (1941), speaks in terms of the issuance of a rule to show cause to avoid "useless grant of the writ with consequent production of the prisoner and of witnesses . . . ." In the instant case, of course, the writ was issued and appellant was "produced" at the hearing (by his counsel, into whose custody he had been released on his personal recognizance). But if, upon the undisputed facts, "it appears, as matter of law, no cause for granting the writ exists," then the relief sought by the habeas corpus petitioner—i.e., release from custody—is unavailable, and the fact that the writ may have been issued, as in the case at bar, is legally meaningless. Where all material facts are undisputed, there is no occasion for the court to hold an evidentiary hearing, whether on the writ or on the rule to show cause.

been in Delaware on the date of the offense is irrelevant to the legal issue of whether the Governor's papers substantially charged appellant with a crime. With regard to the alleged violations of appellant's constitutional rights, the Supreme Court in *Sweeney v. Woodall, supra*, has expressly held that such allegations do not necessitate a hearing. There were no issues of fact before the District Court sufficient to require the taking of testimony.

### CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID C. ACHESON,  
*United States Attorney.*

FRANK Q. NEBEKER,  
JOHN A. TERRY,  
*Assistant United States Attorneys.*